RES JUDICATA AS A FEDERAL QUESTION.

SUPPOSE that in an action brought in a state court by A. against B., B. pleads in bar a judgment rendered in a prior action between the same parties. Suppose further that the trial court rules upon the validity and effect of the judgment and that these rulings are affirmed by the highest court of the state. Can the correctness of these rulings be tested by a writ of error in the Supreme Court of the United States?

It is, of course, familiar law that a case cannot be carried by a writ of error from a state court to the Supreme Court of the United States except in respect of federal questions which are necessary to the decision.[1] But a question is not federal unless it involves a right arising under the Constitution or laws of the United States.[2] The United States Constitution, however, takes care of certain classes of judgments. Thus Article IV, Section 1, provides that

"full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Pursuant to the authority so conferred, Congress in 1804 enacted what is now Section 905 of the Revised Statutes.[3] Within the protection of the constitutional provision and of this section of the statute come the judgments of the court of a sister state,[4] of

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[1] Eustis *v.* Bolles, 150 U. S. 361, 14 Sup. Ct. 131 (1893).

[2] Eustis *v.* Bolles, *supra.*

[3] This section provides: "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

[4] Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. 224 (1892).

the District of Columbia,[5] and of a territory.[6] And it is within the judicial power vested by the Constitution in the Supreme Court to correct upon a writ of error a failure by a state court to give full faith and credit to the judgment of a federal court.[7] If, then, a state court fail to give full faith and credit to one of the judgments just enumerated, a right arising under the Constitution and laws of the United States is violated. Consequently a writ of error to the state court will lie to redress the wrong.

But suppose that instead of giving too little faith and credit to one of the enumerated judgments a state court gives too great effect thereto. Assume that in the jurisdiction where the judgment was rendered it forecloses issues A. and B. Assume further that when the judgment is pleaded in another state and its effect is thereby drawn in question, the state court erroneously holds that it forecloses issues A., B., and C. Will a writ of error lie to the United States Supreme Court at the instance of the party thereby aggrieved?

It may well be argued that in such a case the state court has not failed to give "full faith and credit." On the contrary, it may be urged that it has given "full faith and credit" and something more. But this argument assumes that the words of the Constitution simply prescribe a minimum below which the state court must not fall. It construes the Constitution as if it read: "Not less than full faith and credit shall be given." On the other hand, it may well be argued that the words of the Constitution not only confer a right but also define the extent of that right. The words "full faith and credit" would then operate as words of definition. They would compel the court to go just so far, and would prevent it from going farther. On this theory the party who pleads the judgment may insist that it receive not less than full faith and credit, while the party against whom it is pleaded may object if it receive more than full faith and credit.

This is the construction adopted by Congress in enacting Section 905 of the Revised Statutes. That section provides that the judgments therein enumerated,

[5] Embry *v.* Palmer, 107 U. S. 3, 25 Sup. Ct. 5 (1882).

[6] Gibson *v.* Manufacturers', etc. Ins. Co., 144 Mass. 81, 10 N. E. 729 (1887); Suesenbach *v.* Wagner, 41 Minn. 108, 42 N. W. 925 (1889).

[7] Crescent City, etc. Co. *v.* Butchers', etc., Co. 120 U. S. 141, 7 Sup. Ct. 472 (1887); Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130 (1874).

"shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Perhaps it might originally have been argued that in so defining the words of the Constitution Congress has exceeded its powers. But Article IV, Section 1, expressly confers power upon Congress to prescribe the effect of judgments within its scope. And this statute has stood in its present form since 1804. Moreover, it has frequently been before the Supreme Court (though always where the writ of error was brought upon the ground that the state court below had not given sufficient faith and credit to the judgment drawn in question), and has again and again been applied. It seems too late, therefore, to urge successfully that the statute is unconstitutional, or that the words of the Constitution do not forbid a state court to give too much faith and credit as well as too little to a judgment of a court of a sister state, of a territory, or of the District of Columbia.

It seems strange that the question has not been set at rest by a square decision, but the writer has found no such case. The point was raised, it is true, in a recent case,[8] but the Supreme Court in holding that the state court below had given the proper measure of faith and credit to the judgment in question failed to decide it. There are, however, a considerable number of *dicta* which indicate that a writ of error would lie to a state court under such circumstances.

Thus in Board of Public Works *v.* Columbia College[9] the court said, *obiter*, through Field, J.:[10]

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[8] Everett *v.* Everett, 215 U. S. 203, 30 Sup. Ct. 70 (1909). The facts are worth noting. The plaintiff brought action in New York to set aside on the ground of fraud a decree annulling her marriage to the defendant. The defendant pleaded in bar that the plaintiff had brought against him in the Probate Court of Massachusetts a petition for separate support, that he there pleaded in bar the New York decree annulling his marriage, and that the Massachusetts Court thereupon dismissed the petition. The New York court (Everett *v.* Everett, 180 N. Y. 452, 73 N. E. 231 (1905)) held that the Massachusetts judgment concluded the plaintiff in respect to the validity of the original New York decree, and this ruling was affirmed by the Supreme Court of the United States. For other cases in accord as to the effect as *res judicata* of an adjudication as to the validity of a prior judgment see Bidwell *v.* Bidwell, 139 N. C. 402, 52 S. E. 55 (1905); Dobson *v.* Pearce, 12 N. Y. 156 (1854); Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711 (1895); Fauntleroy *v.* Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

[9] 17 Wall. (U. S.) 521 (1873). [10] *Ibid.* 529.

"No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on that subject."[11]

And in Crescent, etc. Co. *v.* Butchers', etc., Co.[12] the court said, *obiter*, through Matthews, J.:[13]

"It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."[14]

Again, in Tilt *v.* Kelsey[15] it was said, *obiter*, through Moody, J.:[16]

"They [the judgments] can have no greater or less or other effect in other courts than in those of their own state."

It is manifest that a judgment of a court of the same state in which such judgment is pleaded is not within Article IV of the Constitution, or Revised Statutes, Section 905.[17] It is not a judgment of a different state. Nor can the judgment of a court of a foreign country claim the protection of that article or statute.[18] A foreign country is not a state within the meaning of Article IV. As to such judgments, therefore, the question is whether they can claim the protection of some other provision of the Constitution.

It may be conceded that the effect to be given to the judgment of a court of a foreign country might be prescribed by treaty.[19] And

[11] For another *dictum* in accord see Robertson *v.* Pickerell, 109 U. S. 608, 611, 3 Sup. Ct. 407, 409 (1883).

[12] 120 U. S. 141, 7 Sup. Ct. 472 (1887). [13] *Ibid.* 147.

[14] For other *dicta* in accord see Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130, 135 (1874); Metcalf *v.* Watertown, 153 U. S. 671, 676, 14 Sup. Ct. 947 (1894); Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 645, 20 Sup. Ct. 506 (1900); Pittsburgh, etc. Ry. Co. *v.* Long Island, etc. Trust Co., 172 U. S. 493, 510, 19 Sup. Ct. 238 (1899).

[15] 207 U. S. 43, 20 Sup. Ct. 1 (1907). [16] *Ibid.* 57.

[17] Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

[18] Hilton *v.* Guyot, 159 U. S. 113, 16 Sup. Ct. 139 (1895).

[19] See *In re* Ross, 140 U. S. 453, 11 Sup. Ct. 897 (1891) (powers and procedure of United States Consular Court in Japan).

since treaties with foreign nations are part of the supreme law of the land[20] a federal question would be presented if a right under such treaty were drawn in question.[21] But aside from such a treaty a ruling by a state court upon the validity or effect of a judgment of a court of a foreign country can rise no higher, as presenting a federal question, than a ruling by the same court upon the validity or effect of one of its own judgments. These two classes of judgments will therefore be treated together.

It is elementary that a valid and well-pleaded judgment operates by way of estoppel. The question therefore is whether a ruling of a state court upon the effect as an estoppel of a judgment of its own or of a foreign court necessarily draws in question any right under the Constitution or the federal law. It may be argued that if the court erroneously finds an estoppel where none existed, it has deprived the party aggrieved of his day in court. It may also be argued that if the court erroneously fails to give full effect to the judgment it has impaired the obligation of contract. Each contention, if it be sound, manifestly draws in question a constitutional right.

Suppose, then, that the state court has failed to give due effect by way of estoppel to a judgment of its own or of a court of a foreign country. Has it impaired the obligation of contract? It may be admitted that text writers have called a judgment a contract of record, and that an action thereon sounds in contract and not in tort. It is also true that state statutes which impaired judgments founded on agreements express or implied and thereby impaired the original obligation have been held to offend against the constitutional prohibition.[22] But that was because the original contractual obligation was impaired, not because of interference with the judgment.[23] If the cause of action was not founded on a contract, reduction of it to judgment will not confer contractual character. A judgment is not born of a meeting of minds nor created by mutual assent. Hence a judgment founded on a tort[24] or on an award of commissioners in eminent domain proceedings[25]

[20] U. S. Const., Art. VI. [21] See also U. S. Const., Art. III, Sec. 2.

[22] Louisiana *ex rel.* Nelson *v.* St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648 (1884).

[23] Louisiana *ex rel.* Nelson *v.* St. Martin's Parish, *supra.*

[24] Louisiana *v.* Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211 (1883); Freeland *v.* Williams, 131 U. S. 405, 9 Sup. Ct. 763 (1889).

[25] Garrison *v.* City of New York, 21 Wall. (U. S.) 196 (1874).

is not a contract within Article I, Section 10, of the Constitution. It is clear, therefore, that judgments, simply as judgments, cannot claim the protection of this constitutional provision.

But even judgments founded upon a contract express or implied have no special sanctity by way of estoppel under Article I, Section 10. The question whether a contract has come into being, or whether, if valid, its scope is greater or less, raises no question as to impairment of the obligation of contract by the law of a state.[26] Clearly, therefore, a ruling upon the validity or invalidity of a judgment, or upon the nature and scope of the issues concluded thereby under the principle of *res judicata*, cannot raise any question with respect to impairing the obligation of contract. It follows that a failure of a state court to give sufficient effect as an estoppel to one of its own judgments,[27] or to a judgment of a court of a foreign nation, does not raise a federal question.

But suppose that a state court gives too great effect, by way of estoppel, to one of its own judgments or to a judgment of a court of a foreign country. Is the party aggrieved thereby deprived of due process of law or of the equal protection of the laws within the meaning of the Fourteenth Amendment? It is manifest that a judgment may fail as an estoppel for want of jurisdiction over the party sought to be bound,[28] or because it does not foreclose the issue in question.[29] In the one case the question is whether any estoppel exists as against this defendant; in the other, as to whether a given estoppel as against this defendant covers the case at bar. This distinction, as we shall see, is important. A personal judgment rendered without personal jurisdiction is a nullity.[30] To give any effect thereto is a denial of due process of law.[30] And this is true even where the judgment is rendered in the same state where it is drawn in question.[31] If, then, a state court give effect to a judgment rendered in the same state, which judgment is a nullity for want of jurisdiction, the party aggrieved may take the case to the Supreme Court of the United States upon writ of error.[31]

[26] Railway Co. *v.* Rock, 4 Wall. (U. S.) 177 (1866).

[27] Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

[28] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Hall *v.* Lanning, 91 U. S. 160 (1875); Brown *v.* Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702 (1908).

[29] Hughes *v.* United States, 4 Wall. (U. S.) 232 (1866).

[30] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

[31] Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

This was squarely decided in Scott *v.* McNeal.[32] In that case Scott brought against McNeal an action of ejectment in the Superior Court of Thurston County, Washington. Scott proved title in himself in 1888. McNeal then offered in evidence a judgment of the Probate Court of Thurston County, which adjudged Scott to be dead and granted administration upon his estate. Under this decree an administrator was appointed who, pursuant to an order of court, sold the lands in question to one Ward, under whom the defendant claimed. The Superior Court held the probate proceedings to be valid, and the Supreme Court of Washington affirmed the judgment, whereupon the case was brought to the Supreme Court of the United States upon a writ of error. That court held that a probate proceeding upon a living person was void for want of jurisdiction; that to give effect to such a proceeding even in the same state was a denial of due process of law; and that the Supreme Court had jurisdiction upon a writ of error to the state court to review and reverse such a judgment.

We now pass to the other branch of this question. Assuming that a judgment of a court of the same state or of a foreign country binds the parties, and that the only question is as to the extent of the estoppel thereby created, is it a denial of due process if the court erroneously give too wide effect to such estoppel? Here again there is a singular dearth of authorities.

In Gilles *v.* Stinchfield,[33] Stinchfield brought action in the Superior Court of Tuolumne County, California, to recover the value of certain gold alleged to have been taken from the plaintiffs' mining claim by the defendants. One branch of the case involved a question under certain sections of the Revised Statutes of the United States, but the California court decided against the defendant upon the ground of an alleged estoppel by deed. In dismissing the writ of error the United States Supreme Court said, through Chief Justice Fuller:

"But the decision of the Supreme Court [of California] was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the Statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad

[32] 154 U. S. 34; 14 Sup. Ct. 1108 (1893).
[33] 159 U. S. 658, 16 Sup. Ct. 131 (1895).

enough to maintain the judgment. The writ of error must, therefore, be dismissed."

In Phœnix, etc. Ins. Co. *v.* Tennessee[34] the plaintiff (Tennessee) brought action to recover certain taxes. The defendant insurance company pleaded in bar a certain judgment rendered in the same state. The trial court held the judgment to be no bar, and this was affirmed by the Supreme Court of Tennessee. The United States Supreme Court in affirming the judgment below said, through Brewer, J.:

"We think the decision of the Supreme Court [of Tennessee] as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. . . . If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here."

In Beals *v.* Cone[35] the plaintiff brought action in the state court of Colorado with respect to a certain mining claim. One contention of the plaintiff was as to the existence of an alleged estoppel *in pais* against the defendant. The Supreme Court of Colorado ruled against the plaintiff, who sued out this writ of error. In dismissing the writ for want of jurisdiction the United States Supreme Court said, through Brewer, J.:

"The estoppel was not of record but *in pais*, arising, as contended from contradictory statements made by one of the defendants, at a different time and place. Whether such statements work an estoppel depends not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law."

In Schaefer *v.* Werling[36] the question was as to the validity of a certain paving assessment. One defense claimed by the lot owner (Schaefer) was an estoppel *in pais*. The trial court ruled against the estoppel, which judgment was affirmed by the Supreme Court of Indiana. In affirming the judgment, Brewer, J., said:

"It may be observed that, so far as the question was one of estoppel, it was purely a state and not a Federal question."

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[34] 161 U. S. 174, 16 Sup. Ct. 471 (1896).
[35] 188 U. S. 184, 23 Sup. Ct. 275 (1902).
[36] 188 U. S. 516, 23 Sup. Ct. 449 (1902).

It must be noted, however, that none of these cases decide our precise question as to the effect of giving too wide scope to a judgment of a court of a foreign country or of the same state. In Phœnix, etc. Ins. Co. *v.* Tennessee the alleged error was a failure to give sufficient effect as an estoppel to the judgment in question. The language quoted, it is true, is sufficient to cover our problem. But it goes too far, unless that case is to be distinguished from Scott *v.* McNeal on the ground that in the McNeal case the judgment was a nullity, while in the Tennessee case the judgment was admittedly valid and the only question was as to its effect as an estoppel. In Beals *v.* Cone and Schaefer *v.* Werling, also, the alleged error was a refusal to find an estoppel *in pais*. Neither, therefore, decide what is the effect of erroneously finding and giving too great effect to an estoppel by judgment. In Gilles *v.* Stinchfield, however, the error alleged was that the California court erroneously found an estoppel by deed, and it was held that this presented no federal question. That case, therefore, indicates that to sustain an estoppel by deed, even erroneously, does not violate the Fourteenth Amendment.

If, then, the estoppel created by a valid judgment of a court of the same state or of a foreign country is to be treated like questions of estoppel *in pais*, or by deed, the question is whether the Fourteenth Amendment guarantees to every litigant as an element of due process the right to litigate every relevant issue in his case. Logically it seems somewhat difficult to distinguish between raising an estoppel by a void judgment and erroneously extending the estoppel raised by a valid judgment. In each case the litigant is improperly prevented from litigating an issue which he is legally entitled to litigate. There is, however, a difference in degree if not in kind. And there are a good many authorities which indicate that the Fourteenth Amendment does not guarantee the right to litigate every relevant issue. Thus a summary writ of distress may issue against a customs collector to recover the amount found due upon a departmental audit of the collector's accounts, without any preliminary trial.[37] Again, the court will accept as conclusive the determination of the executive upon a political question, such as the date when California was conquered,[38] or the danger of foreign

[37] Murray *v.* Hoboken Land, etc. Co. 18 How. (U. S.) 272 (1855).

[38] United States *v.* Yorba, 1 Wall. (U. S.) 412 (1863); Hornsby *v.* United States, 10 Wall. (U. S.) 224 (1869).

invasion,[39] or as to which of two rival state governments is the legal government,[40] even though the litigant was not party to the decision of the question. In the same way the court will not review the decision of the proper administrative officer that an alleged Chinese[41] or Japanese[42] person is not entitled to enter the United States. And where a discretion has been confided by law to an executive officer, his honest decision on questions of fact is final.[43] The effect given to decisions of the federal Land Office upon questions of fact is another example of the same principle.[44] In all these cases the decision might be right or might be wrong upon the merits, but it was held that the merits of the question could not be litigated, and that the decision was final. These cases, therefore, show that the right to try every relevant issue upon the merits is not necessarily an element either of due process or of equal protection of the laws. And since the Fourteenth Amendment does not guarantee freedom from judicial error to litigants in state courts,[45] it is sufficient if the court decides rightly or wrongly as to the existence and scope of the estoppel created by its own valid judgment or by the valid judgment of a court of a foreign country.

The cases then point to the following conclusions:

1. The Supreme Court of the United States has jurisdiction upon a writ of error to review a ruling by a state court as to the effect of a judgment of a federal court, or of a court of another state, of a territory, or of the District of Columbia, whether the error alleged be that too great or too little faith and credit was given to such judgment.

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[39] Martin *v.* Mott, 12 Wheat. (U. S.) 19 (1827).

[40] Luther *v.* Borden, 7 How. (U. S.) 1 (1849).

[41] United States *v.* Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1904).

[42] Nishimura Ekiu *v.* United States, 142 U. S. 651, 12 Sup. Ct. 336 (1892).

[43] Hadden *v.* Merritt, 115 U. S. 25, 5 Sup. Ct. 1169 (1885) (value of the Mexican dollar); Keim *v.* United States, 177 U. S. 290, 20 Sup. Ct. 574 (1900) (dismissal of subordinate for inefficiency); United States *v.* Johnston, 124 U. S. 236, 8 Sup. Ct. 446 (1888) (amount and propriety of the expenses of a special agent); United States *v.* Milwaukee, etc. Ry., 5 Biss. (U. S.) 410, 421 (1873) (as to whether a proposed bridge will obstruct navigation).

[44] Vance *v.* Burbank, 101 U. S. 514 (1879); Johnson *v.* Drew, 171 U. S. 93, 18 Sup. Ct. 800 (1898); Gertgens *v.* O'Connor, 191 U. S. 237, 24 Sup. Ct. 94 (1903).

[45] Bonner *v.* Gorman, 213 U. S. 86, 29 Sup. Ct. 483 (1909); Central Land Co. *v.* Laidley, 159 U. S. 103, 16 Sup. Ct. 80 (1895); Arrowsmith *v.* Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023 (1886). But on this point see an interesting article by Henry Schofield in 3 Ill. L. Rev. 195.

2. The Supreme Court of the United States has jurisdiction to review and correct upon a writ of error a ruling by a state court that a judgment rendered in the same state or in a foreign country without jurisdiction binds and estops the appellant.

3. Assuming that a valid judgment binding upon the defendant has been rendered by a court of the state in which the judgment is drawn in question or of a foreign country, the Supreme Court of the United States has no jurisdiction to review the effect given thereto as an estoppel, whether the alleged error be that too great or too little effect as an estoppel has been given.

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